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ALEXANDER L. STEVAS,
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No. ___

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ONE 1976 FORD TRUCK VAN,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED

Is a State forfeiture statute which lacks provisions for notice and a hearing saved by the fact that the State afforded notice and an opportunity to be heard to the aggrieved individual prior to the forfeiture?

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COMMONWEALTH OF PENNSYLVANIA,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The above-named Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Pennsylvania entered in this case on February 5, 1981.

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania is reported at Pa. , 424 A.2d 1323 (1981) and is reproduced in Appendix "A" hereof. The Opinions of the Court of Common Pleas of Lehigh County are reported at 6 Pa. D. & C. 3d 511, *aff'd*, 8 Pa. D. & C. 3rd 115 (1978) and are reproduced in Appendix "B" and "C".

JURISDICTION

The Judgment and Opinion of the Supreme Court of Pennsylvania was entered on February 5, 1981, and

this Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 27 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 14:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

35 P.S. Section 780-128. Forfeiture.

(a) The following shall be subject to forfeiture to the Commonwealth and no property right shall exist in them:

(1) All controlled substances or other drugs which have been manufactured, distributed, dispensed, or acquired in violation of this act.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or other drug in violation of this act.

(3) All property which is used, or intended for use, as a container for property described in clause (1) or (2) of this subsection.

(4) All conveyances, including aircraft, vehicles, or vessels, which are used or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in clause (1) or (2) except that:

(i) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title;

(ii) no conveyance shall be forefeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent;

(iii) no bona fide security interest retained or acquired under the Uniform Commercial Code[1] by any merchant dealing in new or used aircraft, vehicles or vessels, or retained or acquired by any licensed or regulated finance company, bank, lending institution, or by any other business regularly engaged in the financing of, or lending of the security of, such aircraft, vehicles or vessels, shall be subject to forfeiture or impairment; and

(iv) no conveyance shall be forfeited under this section for violation of clauses (16) and (31) of subsection (a) of section 13.[2]

(5) All books, records, and research, including formulas, microfilm, tapes and data which are used, or intended for use, in violation of this act.

(b) Property subject to forfeiture under this act may be seized by the law enforcement authority upon process issued by any court of common pleas having jurisdiction over the property. Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant or inspection under an administrative inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the Commonwealth in a criminal injunction or forfeiture proceeding under this act;

(3) There is probable cause to believe that the property is dangerous to health or safety; or

(4) There is probable cause to believe that the property has been used or intended to be used in violation of this act.

---

1. 12A. P.S. §1-101 et seq.
2. Section 780-113 of this title.

(c) In the event seizure without process occurs, as provided herein, proceedings for the issuance thereof shall be instituted forthwith.

(d) Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the law enforcement authority subject only to the orders and decrees of the court of common pleas having jurisdiction over the forfeiture proceedings and of the secretary. When property is seized under this act, the law enforcement authority shall:

(1) Place the property under seal; and either

(2) Remove the property to a place designated by it; or

(3) Require that the department take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(e) Whenever property is forfeited under this act, the property shall be transferred to the custody of the department and the secretary may:

(1) Retain the property for official use;

(2) Sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, but the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising and court costs.

1972, April 14, P.L. 233, No. 64, §28, eff. June 14, 1972.

STATEMENT OF THE CASE

This is a forfeiture proceeding involving a 1976 Ford Truck Van used to transport marijuana and cocaine for sale in violation of The Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. 780-101 et seq. A Petition for Forfeiture was filed in the Court of Common Pleas of Lehigh County on July 29, 1977. A rule to show cause was issued and duly served upon the regis-

tered owner of the said van, who filed first an Answer and then an Amended Answer to the Petition. The Amended Answer admitted all of the allegations of the Petition, and in New Matter alleged the unconstitutionality of the forfeiture provisions of The Controlled Substance, Drug, Device and Cosmetic Act.

In lieu of a hearing, which was deferred until the underlying criminal charges were litigated, the matter was submitted to the hearing court on Petition, Answer and a Stipulation of Facts signed by counsel for the parties.

The facts and merits of the forfeiture claim were not in dispute. The owner's challenge was based solely on his claim that the forfeiture statute was facially unconstitutional. There was, it must be stated, actual notice and an opportunity to be heard provided to the owner in this case. The claim of facial unconstitutionality was premised on a finding that the statute did not mandate, directly or by implication, such notice and hearing.

On May 23, 1978, Court of Common Pleas, per the Honorable Maxwell E. Davison, dismissed the Commonwealth's Forfeiture Petition finding the statute unconstitutional for failing to provide for notice and hearing. Appendix "B".

On June 21, 1978, on Petition of the Commonwealth, the Court below agreed to reconsider its earlier ruling (R. 18A), and after re-argument entered an Order dated October 3, 1978, affirming the earlier Opinion. Appendix "C".

The Commonwealth appealed directly to the Supreme Court of Pennsylvania which held that the registered owner did not have standing to challenge the constitutionality of the statute mandating forfeiture of his vehicle on the ground that the statute failed to provide for notice and hearing since he had been given actual notice and an opportunity to be heard. *Commonwealth v. One 1976 Ford Truck Van,* Pa. , 424 A.2d 1323 (1918); Appendix "A".

REASONS FOR GRANTING THE WRIT

I. The Question of Whether a Statute Depriving an Individual of Property Which Does Not Provide for Notice and a Hearing Prior Thereto Is Saved By The Fact That Notice and a Hearing Were, Nonetheless, Afforded the Individual is a Question Which Has Created a Considerable Split in Authority Amoungst Various State Courts and Raises Significant Recurring Problems in Constitutional Challenges to Such Statutes.

The Supreme Court of Pennsylvania has held that "no one has standing to question the constitutionality of an Act of Assembly unless and until he can show that *his* constitutional rights have been or will be violated by the Act's enforcement." *Commonwealth v. One 1976 Ford Truck Van*, ____ Pa. ____, 424 A.2d 1323 (1981):

> "Even if the forfeiture provisions of the Act were unconstitutional on their face [for failure to provide for notice and a hearing], any violation of [petitioner's] rights that would have resulted from strict compliance with the Act has been prevented by the actual notice and opportunity for hearing that [petitioner] received. We therefore hold that [petitioner] has no standing to challenge the constitutionality of the . . . Act." 424 A.2d at 1325.

On the other hand, the Michigan Court of Appeals has held in *People v. Campbell*, 39 Mich. App. 433, 198 N.W. 2d 7 (1972) that the fact that forfeiture procedures have been adopted and utilized by the State which comport with due process does not save the statute where the Act, itself, does not provide for a notice and an opportunity to be heard:

> ". . . But the forfeiture statute at issue cannot be upheld simply because notice and a hearing were actually provided. . . .

> The constitutionality of the act must rest upon the provisions of the act itself. . . . The constitutionality of the challenged statute can only be sustained if the due process standards are contained within its provisions . . ."

Accord, People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932); *Huges v. Neth*, 80 Cal. App. 3rd 952 146 Cal. Rptr. 37 (1973); *State v. Miller*, 248 N.W. 2d 377 (S.D. 1976); *State v. Matheson*, 84 Wash. 2d 130 524 P.2d 388 (Wash. 1974). But see, contra, *State v. Garcia*, 276 A.2d 880 (N.J. super. 1971).

The divergent conclusions which have been reached by various State Appellate Courts on this issue, and the resulting problems to State and local officials, are perhaps the best evidence that this issue is one which must be resolved by the United States Supreme Court. The Supreme Court's guidance is greatly needed to answer the significant federal constitutional due process question here.

II. The Supreme Court of Pennsylvania Has Decided This Case in a Matter Contrary to and Not Consistent with Prior Decisions of This Court.

In the case of *Coe v. Armour Fertilizer Works*, 237 U.S. 413 at 425 (1914) the Court stated:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart v. Palmer*, 74 N.Y. 183, 188, 30 Am.Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and a op-

portunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court."

In light of the various State appellate court decisions that seem to be at variance with the above case, a final answer is needed to the question of whether *Coe v. Armour Fertilizer Works, supra,* is still good law. See also, *United States v. Thirty-seven Photographs,* 402 U.S. 363 (1971) (It is only where a forfeiture statute contains an absolute requirement that a forfeiture statute contains an absolute requirement that a forfeiture complaint be filed and hearing held within a specified period of time that such statutes have been constitutionally upheld).

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of Pennsylvania in this matter.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 1981, three copies of the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania were mailed by first class mail to William H. Platt, Esquire, District Attorney of Lehigh County, Lehigh County Courthouse, P.O. Box 1548, Allentown, Pennsylvania, 18105. I further certify that all parties required to be served have been served.

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APPENDIX A

OPINION OF THE COURT

LARSEN, Justice.

On July 29, 1977, the Commonwealth commenced this forfeiture proceeding by petition in the Court of Common Pleas of Lehigh County under §§28 and 29 of The Controlled Substance, Drug, Device and Cosmetic Act, Act of April 14, 1972, P.L. 233, No. 64, as amended, 35 P.S. §§780-128 and 780-129 (the Act). The subject of the proceeding was a 1976 Ford truck van which appellee Guy Walter Wagner had used for the unlawful transportation of marijuana and cocaine. The only defense appellee asserted was that §§28 and 29—the forfeiture provisions—of the Act were "violative of [his] rights to due process of law under the Fourteenth Amendment to the United States Constitution and the applicable provisions of the Pennsylvania Constitution." After holding that the forfeiture provisions of the Act were unconstitutional because they failed to mandate notice or an opportunity to be heard prior to forfeiture, the Court of Common Pleas denied the Commonwealth's petition. 6 Pa. D.&C.3d 511, *aff'd*, 8 Pa. D.&C.3d 115 (1978). The Commonwealth has appealed directly to this Court.[1]

The Commonwealth asserts that appellee lacks standing to challenge the constitutionality of the forfeiture provisions of the Act. Counsel for appellee conceded in the court below "that [appellee] has been afforded notice and an opportunity to be heard in defense of his vehicle." 6 Pa. D.&C.3d at 512. Despite this concession and the court's recognition that "the respondent's standing to challenge the constitutionality of the forfeiture statute is not without question since he has not been injured by any alleged deficiency in the wording thereof," *id.*, the court went on to resolve the constitutional issue

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1. *See* Act of July 9, 1976, P.L., 586 No. 142, § 2, as amended, 42 Pa. C.S.A. § 722(7).

before it. We think that appellee's standing in this case is not merely questionable; it is, rather, wholly lacking. Accordingly, we do not reach the constitutional issue presented.[2]

Our cases held that "no one has standing to question the constitutionality of an Act of Assembly unless and until he can show that *his* constitutional rights have been or will be violated by the Act's enforcement." *Booz v. Reed*, 398 Pa. 172, 175-76, 157 A.2d 170, 172 (1960) (emphasis added). *See also Rich Hill Coal Company v. Chesnut*, 355 Pa. 13, 47 A.2d 801 (1946); *Knowles' Estate*, 295 Pa. 571, 145 A. 797, 63 A.L.R. 1086 (1929).

In this case, appellee has suffered no violation of *his* constitutional right to due process. Even if the forfeiture provisions of the Act were unconstitutional on their face, any violation of appellee's rights that would have resulted from strict compliance with the Act has been prevented by the actual notice and opportunity for hearing that appellee received. We therefore hold that appellee has no standing to challenge the constitutionality of The Controlled Substance, Drug, Device and Cosmetic Act.

The order of the Court of Common Pleas of Lehigh County is reversed and the case is remanded for further proceedings.

ROBERTS, J., would vacate the order and remand the case.

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2. We note, however, that since the date of the lower court's opinions in this case, the Commonwealth Court has determined that the forfeiture provisions of the Act meet due process requirements. *One 1965 Buick 4 Door Sedan v. Commonwealth*, 46 Pa.Cmwlth. 189, 408 A.2d 157 (1979) (petition for allowance of appeal denied, February 20, 1980).

APPENDIX B

COURT OF COMMON PLEAS OF LEHIGH COUNTY CRIMINAL

Commonwealth of Pennsylvania) : No. 53-M of 1977
vs.) : Miscellaneous
One 1976 Ford Truck Van) Docket

* * *

Appearances:

Michael Moyer, Esquire, Assistant District Attorney, with him William H. Platt, Esquire, District Attorney,

On behalf of the Commonwealth.

Allan Ellis, Esquire,

On behalf of Respondent, Guy Wagner.

* * *

OPINION

MAXWELL E. DAVISON, *Judge*.

This proceeding challenges the validity of the forefiture provisions of the Controlled Substance, Drug, Device and Cosmetic Act, Pa.Stat.Ann.tit. 35 §780-128.

On July 19, 1977, the Commonwealth filed a Petition for Seizure and Forfeiture of the 1976 Ford Truck Van alleged to have been involved in the transportation for sale of a controlled substance some three weeks earlier. A hearing was deferred pending disposition of the underlying criminal charges, *see Commonwealth v. One (1) 1971 Ford LTD*, ____ Pa. Super. Ct. ____, 369 A.2d 414 (1976). Thereafter, Guy Wagner, the respondent herein, pled guilty in Monroe County Court to two counts of delivery of a controlled substance.

The respondent does not dispute the merits of the forfeiture claim. Indeed, his counsel concedes that he has been afforded notice and an opportunity to be heard in defense of his vehicle. Rather, he asserts that the forfeiture provisions of the Controlled Substance, Drug, Device and Cosmetic Act are facially unconstitutional as violative of procedural due process by reason of the statute's failure to require the necessary procedural amenities.

While the respondent's standing to challenge the constitutionality of the forfeiture statute is notwithout question since he has not been injured by any alleged deficiency in the wording thereof, it is obvious that he nonetheless has a sufficient stake in that he faces the loss of his vehicle and we will therefore decide the question raised. *People v. Campbell*, 39 Mich. App. 433, 198 N.W.2d 7 (1972).

The forfeiture provisions for vehicles used in transporting controlled substances in Pennsylvania have their roots in the Uniform Controlled Substances Act (U.L.A.) §505 which has been adopted by the legislatures of at least forty-five jurisdictions. The relevant provisions of the Pennsylvania enactment, namely those found in Pa.Stat.Ann.tit. 35 §780-128, are:

> "(a) The following shall be subject to forfeiture to the Commonwealth and no property right shall exist in them:
>
> * * *
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in clause (1) or (2) except that:
>
> (i) no conveyance used by any person as a common carrier in the transaction of business as a

common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title;

(ii) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent;

(iii) no bona fide security interest retained or acquired under the Uniform Commercial Code by any merchant dealing in new or used aircraft vehicles or vessels, or retained or acquired by any licensed or regulated finance company, bank, lending institution, or by any other business regularly engaged in the financing of, or lending on the security of, such aircraft, vehicles or vessels, shall be subject to forfeiture or impairment; and

(iv) no conveyance shall be forfeited under this section for violation of clauses (16) and (31) of subsection (a) of section 13.

* * *

"(b) Property subject to forfeiture under this act may be seized by the law enforcement authority upon process issued by any court of common pleas having jurisdiction over the property. Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant or inspection under an administrative inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the Commonwealth in a criminal injunction or forfeiture proceeding under this act;

(3) There is probable cause to believe that the property is dangerous to health or safety; or

(4) There is probable cause to believe that the property has been used or is intended to be used in violation of this act.

(c) In the event seizure without process occurs, as provided herein, proceedings for the issuance thereof shall be instituted forthwith.

(d) Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the law enforcement authority subject only to the orders and decrees of the court of common pleas having jurisdiction over the forfeiture proceedings and of the secretary. When property is seized under this act, the law enforcement authority shall:

(1) Place the property under seal; and either

(2) Remove the property to a place designated by it; or

(3) Require that the department take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(e) Whenever property is forfeited under this act, the property shall be transferred to the custody of the department and the secretary may:

(1) Retain the property for official use;

(2) Sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, but the proceeds from any such sale shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising and court costs."[1]

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1. The above language duplicates that in the U.L.A. draft *verbatim*.

Our research has uncovered *Fell v. Armour*, 355 F.Supp. 1319 (M.D. Tenn. 1972), in which the Uniform Act's forfeiture section as adopted by Tennessee was declared facially unconstitutional as an abridgment of the Fourteenth Amendment due process clause. *Fell* reasoned that the statute contained no requirement that an owner of a seized vehicle be given either notice or an opportunity to be heard with the burden of proof on the state to prove the propriety of forfeiture. A decision of the Pennsylvania Superior Court, *Commonwealth v. One (1) 1971 Ford LTD, supra*, alludes to *Fell* in such a way as could be construed to contradict the *Fell* holding. However, our analysis of the *LTD* and *Fell* decisions leads us to conclude that the *LTD* case was referring to another part of the *Fell* opinion which ruled that other provisions of the statute are constitutionally permissible.

The Supreme Court of Washington, in *State v. Matheson*, 84 Wash.2d 130. 524 P.2d 388, 390 (1974), relied upon by respondent's counsel, faced with a constitutional attack on the exact language before us now, held the Uniform Act's forfeiture provisions to be violative of due process for the following reasons:

> "The United States Supreme Court, in an opinion handed down subsequent to oral argument in this case, held the Puerto Rican seizure and forfeiture statutes to be constitutional although no preseizure notice or hearing was provided. Calero-Toledo v. Pearson Yacht Leasing Co., U.S. , 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). The Court noted at page , 94 S.Ct. at page 2089: First, seizure under the Puerto Rican statutes serves significant governmental purposes: Seizure permits Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, preseizure

notice and hearing might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed or concealed, if advance warning of confiscation were given. And finally, unlike the situtation in *Fuentas* [Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556], seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes. In these circumstances, we hold that this case presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process.

"A comparison of our statute with the Puerto Rican statutes upheld in *Calero* compels a finding that subsection (b)(4) still cannot be allowed to stand. Seizure of appellant's property in *Calero* was accomplished pursuant to Puerto Rico Laws Ann., Title 34 § 1722. As required by the statute, the lessee of the yacht was given notice within 10 days of the seizure. [W]hen challenge to the seizure was not made within 15 days after service of the notice, the yacht was forfeited pursuant to § 1722(c). By contrast, RCW 69.50.505(c) simply states: 'In the event of seizure pursuant to subsection (b), proceedings under subsection (d) shall be instituted promptly.' Subsection (d) states: 'Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the board or seizing law enforcement agency subject only to the orders and decrees of the superior court having jurisdiction over the forfeiture proceedings.' There is no provision in RCW 69.50.505(b)(4) for notice and a hearing even after seizure. While *Calero* holds that in an extraordinary situation such as this, notice and a hearing may be postponed until

after seizure, it does not allow for abolishment of notice and a hearing.

"Inasmuch as subjection (b)(4) does not provide for notice and hearing even after seizure it is violative of due process even under the holding in *Calero*. Accordingly, the trial court is reversed and the order of forfeiture is dismissed."

See also: State of Louisiana v. 1971 Green GMC Van, La. , (Louisiana Supreme Court, decided September 19, 1977).

The language of our statute is identical in all pertinent respects to the Washington law. Both fail to mandate any sort of notice or hearing to effect the forfeiture itself and, consequently offend due process.[2]

"(a) The proceedings for the forfeiture or condemnation of all property shall be in rem, in which the Commonwealth shall be the plaintiff and the property the defendant. A petition shall be filed in the court of quarter sessions, verified by oath or affirmation of any officer or citizen, containing the following: (1) a description of the property so seized; (2) a statement of the time and place where seized; (3) the owner, if known; (4) the person or persons in possession, if known; (5) an allegation that the same had been possessed or used or was intended for use in violation of this act; (6) and, a prayer for an order of forfeiture that the same be adjuded forfeited to the Commonwealth, unless cause be shown to the contrary.

(b) A copy of said petition shall be served personally on said owner if he can be found within the jurisdiction of the court, or upon the person or persons in

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2. By contrast, the Pennsylvania Liquor Code contains a relatively elaborate mechanism to insure procedural due process in cases where the Liquor Board seeks the forfeiture of vehicles used in the illegal transportation of liquor. Pa.Stat.Ann.tit. 47 § 6-602 provides:

possession at the time of the seizure thereof. Said copy shall have endorsed thereon a notice as follows:

'To the Claimant of Within Described Property: You are required to file an answer to this petition, setting forth your title in and right to possession of said property, within fifteen (15) days from the service hereof; and you are also notified that if you fail to file said answer, a decree of forfeiture and condemnation will be entered against said property.'

Said notice shall be signed by petitioner or his attorney, or the district attorney or the Attorney General.

(c) If the owner of said property is unknown or outside the jurisdiction of the court and there was no person in possession of said property when seized, or such person so in possession cannot be found within the jurisdiction of the court, notice of said petition shall be given by an advertisement in only one newspaper of general circulation published in the county where such property shall have been seized once a week for two (2) successive weeks. No other advertisement of any sort shall be necessary, any other law to the contrary notwithstanding. Said notice shall contain a statement of the seizure of said property, with a description thereof, the place and date of seizure, and shall direct any claimants thereof to file a claim therefor on or before a date given in said notice, which date shall not be less than ten (10) days from the date of the last publication.

Neither the fact that these forfeiture provisions may well be desirable, designed as they may be for the purpose of crippling illegal trafficking in drugs, nor the fact that forfeiture procedures have been adopted and followed by the District Attorney of Lehigh County and various district attorneys' offices which comport with due process

save the statute, for as the Michigan Court of Appeals held in *People v. Campbell, supra*, at 10-12:

> ". . . But the forfeiture statute at issue cannot be upheld simply because notice and a hearing were actually provided. . . .
>
> The constitutionality of the act must rest upon the provisions of the act itself. . . . The constitutionality of the challenged statute can only be sustained if the due process standards are contained within its provisions . . ."
>
> (d) Upon the filing of any claim for said property, setting forth a right of possession thereof, the case shall be deemed at issue and a time be fixed for the hearing thereof.
>
> (e) At the time of said hearing, if the Commonwealth shall produce evidence that the property in question was unlawfully possessed or used, the burden shall be upon the claimant to show (1) that he is the owner of said property, (2) that he lawfully acquired the same, and (3) that it was not unlawfully used or possessed.
>
> In the event such claimant shall prove by competent evidence to the satisfaction of the court that said liquor, alcohol or malt brewed beverage, or still, equipment, material, utensil, vehicle, boat, vessel, container, animal or aircraft was lawfully acquired, possessed and used, then the court may order the same returned or delivered to the claimant; but if it appears that said liquor, alcohol or malt or brewed beverage or still, equipment, material or utensil was unlawfully possessed or used, the court shall order the same destroyed, delivered to a hospital, or turned over to the board, as hereinafter provided, or if it appears that said vehicle, boat, vessel, container, animal or aircraft was unlawfully possessed or used, the court may, in its discretion, adjudge same forfeited and condemned as hereinafter provided."

We have not been made aware of any case in Pennsylvania that has addressed the constitutional issue raised here. Enforcement has been implicitly approved. *Commonwealth v. One (1) Ford LTD, supra; Commonwealth v. One 1966 Porsche Coupe,* 97 Dauph. 243 (1975). However, the issue is squarely before us and we are satisfied that the presumption of constitutionality has been overcome in this case. *See Owen J. Roberts School Dist. v. Pickar,* 4 Pa.Commw.Ct. 273, 286 A.2d 14 (1972); *Jackson v. William Penn Bd. of School Directors,* 63 Del. Co. 4, 73 D.&C.2d 443 (1975).

Accordingly, we are obliged to dismiss the Commonwealth's petition since no forfeiture can be lawfully effected under the subject statute.

APPENDIX C

COURT OF COMMON PLEAS OF LEHIGH COUNTY CRIMINAL

Commonwealth of Pennsylvania)
:
vs.)No. 53-M of 1977
:
One 1976 Ford Truck Van) *Miscellaneous Docket*

* * *

Appearances:

William H. Platt, Esquire, District Attorney
On behalf of the Commonwealth.

Alan Ellis, Esquire,
On behalf of the Respondent, Guy Wagner.

* * *

OPINION

MAXWELL E. DAVISON, *Judge*.

At the Commonwealth's request we have agreed to reconsider our May 23, 1978 determination that the absence of due process requirements prior to forfeiture render the forfeiture provisions of the Controlled Substance, Drug, Device and Cosmetic Act, Act of April 14, 1972, P.L. 233, No. 64, §28, Pa.Stat.Ann.tit. 35 §780-128 ("The 1972 Act") invalid. Further briefs have been filed and supplementary oral argument has been presented.

Briefly, the factual background is that the Commonwealth petitioned for the seizure and forfeiture of the 1976 Ford truck van alleged to have been involved in the transportation for sale of a controlled substance. The respondent pled guilty to two counts of delivery of a controlled substance and later, in this proceeding, asserted

the forfeiture provisions of The 1972 Act to be facially unconstitutional. We dismissed the Commonwealth's petition.

The District Attorney contends that certain statutory provisions discovered since our May decision save The 1972 Act by mandating adequate and an opportunity for the aggrieved party to be heard prior to forfeiture, and, in the alternative, that we should look to the procedural rules for the necessary due process requirements and if such rules are deficient, that the Court may itself legislate due process to save the statute. Having dealt at length with the constitutionality of The 1972 Act in our decision of May 23, in the interests of expedition, we will incorporate that Opinion herein and focus our attention on the new arguments advanced by the Commonwealth.

It appears that subsequent to our Opinion of May 23, the pocket part edition of Title 35 of Purdon's Statutes was released. By a process of reindexing the West Publishing Company "grafted" to The 1972 Act certain provisions of the Act of July 3, 1941, P.L. 263 (The Act of 1941), which were formerly contained in the Vehicle Code volumes which were superseded by the new Vehicle Code (Pa.Stat.Ann.tit. 75 §§2051-2055). Ostensibly, since the new Vehicle Code, Act of June 17, 1976, P.L. 162, No. 81, did not repeal the Act of 1941, it is argued that the latter provisions retained their vitality; however, to so conclude ignores the effect of The 1972 Act on pre-existing forfeiture law.

The 1972 Act explicitly purports to establish a uniform system of law covering all aspects of controlled substances and drugs, *see* Pa.Stat.Ann.tit. 35 §780-141. Moreover, it specifically repeals "all other acts, or parts of acts, inconsistent with this act . . ." Pa.Stat.Ann.tit. 35 §780-143(b). In *Commonwealth v. One 1967 Pontiac*, 21 Chest, 39, 61 D.&C.2d 735 (1972), the Court was called upon to decide whether The Act of 1941 remained in effect after the passage of The Act of 1972. In resolving

that question in the negative, Judge Shelley, specially presiding, held:

> "The Act of September 26, 1961, P.L. 1664, 35 PS §780-1, entitled The Drug, Device and Cosmetic Act, which was repealed specifically by the Act of June 14, 1972, sec. 43, supra, contained no provision for the forfeiture and condemnation of vehicles used in the transportation of narcotics and illegal drugs. The Act of July 3, 1941, supra, was of necessity used for that purpose.
>
> When the Act of 1972, supra, was enacted, section 28 of the act was included for the purpose of making forfeiture and condemnation uniform through Pennsylvania thereby eliminating the necessity for the Act of 1941, supra. We conclude it was the intention of the legislature in enacting the Act of 1972, supra, to set up a general or exclusive system covering the entire subject of narcotics and illegal drugs.
>
> "Article VII, subsection 91 of the Statutory Construction Act of May 28, 1937, 46 PS §591, provides in part that: 'Whenever a law purports to . . . [set] up a general or exclusive system covering the entire subject matter of a former law . . . such law shall be construed to repeal all former laws upon the same subject.'
>
> "Considering what has been said above we hold that the repealing clause of the Act of 1972, supra, repeals the Act of 1941, supra, by implication . . ."

We concur with the view that The 1972 Act was intended as an *exclusive* scheme for regulating trafficking in drugs. Moreover, since The 1941 Act contradicts The 1972 Act in several material instances, we hold that the latter was meant to replace the former and that The 1941 Act, being inconsistent with the 1972 Act, was implicitly repealed thereby. Pa.Stat.Ann.tit. 35 §780-143(b).

While the District Attorney argues that when a statute which impliedly repeals a prior statute is itself struck down for being constitutionally deficient, the former statute is deemed to be revived and in effect, *see Mazurek v. Farmers' Mutual Fire Ins. Co. of Jamestown*, 320 Pa. 33, 181 A. 570 (1935), such an argument is of no benefit to the Commonwealth here since a revived 1941 Act would suffer essentially the same infirmities as does The 1972 Act. The 1941 Act is facially unconstitutional in that Section 5(3), Pa.Stat.Ann.tit. 35 §831.5(3), provides only notice by publication for owners of seized property living outside the jurisdiction whose addresses are known, contrary to the dictates of *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), and *Fell v. Armour*, 355 F.Supp. 1319, 1328 (M.D. Tenn. 1972). Also, the Act falls below constitutional standards in that it does not require the seizing authority to initiate forfeiture proceedings or to provide notice of seizure within any specific, reasonable time. *State v. Matheason*, 84 Wash.2d 130, 524 P.2d 388 (1974).

Further, we are constrained to note that this proceeding was grounded, not under the 1941 Act, but *specifically* upon The 1972 Act. The Petition for Seizure and Forfeiture alleges that it is ". . . under the authority of the Controlled Substance, Drug, Device and Cosmetic Act, P.L. 64 [233] 1972 . . ." We next turn our attention to the District Attorney's argument that The 1972 Act can be held constitutional either through reference to the rules of procedure or by this Court's decree.

In support of the proposition that The 1972 Act's due process deficiencies can be remedied by resort to and application of procedural rules, the District Attorney relies on *Sensenbrenner v. Crosby*, 306 N.E.2d 413 (1974), in which the Ohio Supreme Court incorporated that jurisdiction's procedural rules into the forfeiture law, observing that the rules specifically applied to all civil procedures. In Pennsylvania, however, no such

analogous provision can be found in either the civil or criminal rules. Also, *Sensenbrenner* observed that its ruling was inconsistent with others and rested its holding squarely on the declaration of the procedural rules that the Court applied to all civil cases.

Cases from other jurisdictions relied upon by the Commonwealth suffer equally, since, in each case, the Court observed that it had the constitutional power to provide for the requirements of due process even though the legislature had not done so in enacting the forfeiture law. *See State v. Garcia*, 114 N.J. Super.Ct. 444, 276 A.2d 880 (1971); *State v. Amer.-Hawaiian S.S.Co.*, 29 N.J. Super.Ct. 116, 101 A.2d 598 (1953). However, while Art. 5 §10 of our Constitution grants plenary rule making authority to the Supreme Court, such power has not been employed to provide for due process under The 1972 Act. Indeed, and in any event, this Court lacks the power to promulgate such rules.

The Commonwealth cites *Nelson v. Garland et al.* 123 Pa.Super.Ct. 257, 265, 187 A. 316, 319 (1936), for the proposition that where a law provides for a hearing before a court, it implies that the parties to be effected have notice and an opportunity to be heard. The particular difficulty in applying *Nelson* to the case at bar is that the forfeiture law fails to mandate a judicial proceeding prior to the forfeiture. In fact, the only language which even seems to envision court involvement is contained in Pa.Stat.Ann.tit. 35 §780-128(d) which provides in pertinent part:

> "(d) Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the law enforcement authority subject only to the orders and decrees of the court of comon pleas having jurisdiction over the forfeiture proceedings and of the secretary . . ."

Nor is a revived 1941 Act saved from its constitutional deficiencies by *Nelson*, *supra*. Taken as a whole,

the *Nelson* decision holds only that the due process requirements of notice and opportunity to be heard are required before an effective judgment can be rendered against a party. It does not stand for the proposition that every statute which makes mention of a hearing is cured of all due process defects by an implied insertion of constitutionally required procedures.

It is apparent that the forfeiture provisions contain no mandatory procedure to be followed to achieve the forfeiture of a conveyance allegedly used to transport drugs illegally. Nowhere does The 1972 Act provide for the institution of proceedings, notice, hearing, or the other attributes of procedural due process. We remain convinced and the overwhelming weight of persuasive authority supports our May 23 determination that the statute authorizing the forfeiture must, if it is to pass constitutional muster, provide for due process either within its text or by reference to other mandatory provisions. In *State v. Matheason, supra,* the Washington Supreme Court held that the same provisions as those contained in our statute were unconstitutional for failing to contain provisions for notice and hearing after the seizure took place. In *People v. Campbell,* 39 Mich.App. 433, 198 N.W.2d 7 (1972), the Michigan Court of Appeals held that due process must be required by the statute authorizing the forfeiture or by some other mandatory rule at the very least, observing: "The constitutionality of the act must rest upon the provisions of the act itself." This view is in the clear majority with tribunals that have scrutinized conveyance forfeiture provisions similar to if not identical to those before us. *See State v. Miller et al.,* 248 N.W.2d 377 (S.Dakota Supreme Ct. 1976); *State v. One 1972 Mercury Capri,* 85 Wash.2d 620, 537 P.2d 763 (1975).

In a case not concerned with forfeiture, *Fuentes v. Shevin,* 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972), the United States Supreme Court framed the issue facing it in the following language:

> "The primary question in the present cases is whether *these state statutes* are constitutionally defective in failing to provide for hearings 'at a meaningful time.' " (Emphasis added.)

Fuentes found various statutes unconstitutional for failing to require a hearing prior to seizure of secured goods.

It is clear, therefore, as we observed in our May 23rd decision, "Neither the fact that these forfeiture provisions may well be desirable, designed as they may be for the purpose of crippling illegal trafficking in drugs, nor the fact that forfeiture procedures have been adopted and followed by the District Attorney of Lehigh County and various district attorneys' offices which comport with due process save the statute, . . ."